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MD SHAHIDUL ISLAM v. KETUA PENGARAH JABATAN IMIGRESEN MALAYSIA & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD KAMAL MD SHAHID J
[JUDICIAL REVIEW NO: WA-25-381-05-2022]
29 AUGUST 2023

B

Abstract – *The cancellation of a principal pass to a social visit pass, under s. 9(1)(b) of the Immigration Act 1959/63 ('IA'), automatically triggers s. 9(6)(b) of the IA; a dependant pass is invalidated under s. 9(4) of the IA and, consequently, the dependant pass holder is required to leave Malaysia and is prohibited from re-entering the country. Once the principal pass is cancelled and the holder is notified of the cancellation, such notification to the holder of the principal pass shall be considered as a notification to the holder of a dependant pass to the automatic cancellation of his/her dependant pass.*

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ADMINISTRATIVE LAW: *Judicial review – Application for – Application to quash decision of Director General of Immigration – Applicant's wife 'principal' pass holder under Malaysia My Second Home Programme – Applicant held 'dependant' pass – Applicant's dependant pass cancelled following cancellation of wife's principal pass – Applicant and wife found to be involved in illegal syndicate – Whether cancellation of applicant's dependant pass carried out in accordance with law – Whether decision of Director General of Immigration tainted with errors of law, irrationality and/or unreasonableness – Rules of Court 2012, O. 53*

E

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IMMIGRATION: *Pass – Cancellation – Applicant's wife 'principal' pass holder under Malaysia My Second Home Programme – Applicant held 'dependant' pass – Applicant's dependant pass cancelled following cancellation of wife's principal pass – Applicant and wife found to be involved in illegal syndicate – Whether cancellation of applicant's dependant pass carried out in accordance with law – Immigration Act 1959/63, ss. 9(1)(b), 9(6)(b) & 9(4)*

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The applicant was the husband holding a 'dependant' pass to a social visit pass issued to his wife ('Nilima') as the 'principal' pass holder under the Malaysia My Second Home (MM2H) programme. The approval of the principal pass to his wife and the dependant pass to the applicant was issued by the Immigration Department in 2008. Clause (d) of the approval set out that one of the terms of the approval was that 'the duration of the dependant's social visit pass was subjected to the validity of the principal's approval'. Nilima's principal pass and the applicant's dependant pass were subsequently renewed and extended for a further period of ten years by way of an approval

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given by the Immigration Department in its letter. Clause 2.6 of the said letter provided an additional term that 'in the event that the Ministry of Tourism and Culture Malaysia/Immigration Department of Malaysia/Royal Police of Malaysia found that you have committed a crime in Malaysia or elsewhere, your stay under this programme would be immediately terminated'. On 8 August 2021, Nilima's principal pass was cancelled by the Director General of the Immigration ('first respondent') and a notice of cancellation was issued by the first respondent. The cancellation of Nilima's principal pass and the deportation to her country, Bangladesh, followed by her earlier arrest by the Special Branch of Polis Diraja Malaysia ('PDRM'), was based on intelligence of her involvement in a syndicate providing illegal temporary working pass to foreigners to come to Malaysia. The applicant's dependant pass was also cancelled and a notice of cancellation of pass was issued by the first respondent ('first respondent's notice of cancellation'). The applicant was charged at the Sessions Court under s. 55E of the Immigration Act 1959/63 ('IA') and s. 12(1)(f) of the Passports Act 1966 as 270 foreign passports were found on him when he was arrested. The applicant was released on bail while awaiting trial. In the present application for judicial review, the applicant sought to quash the first respondent's notice of cancellation.

Held (dismissing application):

(1) When Nilima's principal pass was cancelled under s. 9(1)(b) of the IA, s. 9(6)(b) of the IA was automatically triggered where the applicant's dependant pass was invalidated under s. 9(4) of the IA and consequently, the applicant, as the dependant pass holder was required to leave Malaysia and was prohibited from re-entering thereafter, as stipulated in s. 9(4)(a) of the IA. Furthermore, by virtue of s. 9(6)(b) of the IA, once Nilima's principal pass was cancelled under s. 9(1)(b) of the IA and Nilima was notified of the cancellation, such notification to Nilima shall be considered as a notification to the applicant regarding the automatic cancellation of his dependant pass. Since s. 9(6)(b) of the IA read together with s. 9(4)(a) of the IA, dictating the cancellation of the applicant's dependant pass was mandated by legal provisions, it was therefore evident that the cancellation of the applicant's dependant pass was carried out in accordance with the law, leaving no room for doubt. (paras 35-37)

(2) Since the applicant was deemed to have actual knowledge of the automatic cancellation of his dependant pass on 8 January 2021, the cause of action to file the present judicial review would have accrued on 8 January 2021. The applicant, however, filed the judicial review on 25 May 2022, which considerably exceeded the stipulated 90-day time

frame, even after deducting the period for which the applicant was under remand and custody where he was unable to seek any legal advice. Even though the applicant had sought an extension of time, which was granted by the court, to file the judicial review, the period for the said extension was confined to the period starting from his second arrest and filing of the present judicial review *ie*, 26 January 2022 until 22 May 2022. (paras 39, 40 & 43)

(3) Clause 2.6 of the approval for renewal/extension of pass did not say that the applicant's dependant pass could only be cancelled upon a criminal conviction by the court. The cancellation of the applicant's dependant pass did not necessitate or depend solely on a prior conviction of criminal charges in a court of law. Furthermore, matters concerning immigration, particularly the expulsion of foreign nationals to their country of origin fell within the exclusive domain of the Executive competence. More importantly, there were such findings on involvement in criminal activities made by the PDRM and the first respondent; intelligence from the Special Branch of the PDRM revealed that the applicant was involved in the same illegal immigration as Nilima which had endangered national security. (paras 51, 52, 53 & 59)

(4) The decision of the respondents was not tainted with any errors of law, irrationality and/or unreasonableness that warranted the intervention of the court. (para 74)

Case(s) referred to:

Airspace Management Services Sdn Bhd v. Col (B) Harbans Singh Chingar Singh [2000] 4 CLJ 77 CA ***(refd)***

Alam Venture Sdn Bhd & Anor v. Abdul Aziz Abdul Majid & Ors [2015] 5 CLJ 1 FC ***(refd)***

Haris Fathillah Mohamed Ibrahim & Ors v. Tan Sri Dato' Sri Hj Azam Baki & Ors [2023] 3 CLJ 653 FC ***(refd)***

Kumpulan Perangsang Selangor Bhd. v. Zaid Mohd Noh [1997] 2 CLJ 11 SC ***(refd)***

Petroliam Nasional Bhd v. Nik Ramli Nik Hassan [2003] 4 CLJ 625 FC ***(refd)***

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***

Regina (Privacy International) v. Investigatory Powers Tribunal [2020] AC 491 ***(refd)***

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***

Legislation referred to:

Immigration Act 1959/63, ss. 9(1)(b), (4)(a), (6)(b), (8), 33(1), 55E, 59A(1), (2), 59B(b)

Passports Act 1966, s. 12(1)(f)

Rules of Court 2012, O. 53

For the applicant - Harpal Singh & Low Carmen; M/s T Harpal & Assocs

For the respondent - Liew Horng Bin; SFC

Reported by Najib Tamby

JUDGMENT

Ahmad Kamal Md Shahid J:

Introduction

[1] The applicant filed an application for judicial review (encl. 14) under O. 53 of the Rules of Court 2012 (ROC) to quash the first respondent's notice of cancellation of the applicant's Malaysia My Second Home (MM2H) pass dated 16 December 2021.

[2] In essence, the applicant was granted leave to apply for judicial review against the respondents to seek the following reliefs:

(i) Satu perintah *certiorari* membatalkan tindakan dan keputusan Ketua Pengarah Imigresen Malaysia yang telah mengeluarkan satu Notis Pembatalan Pas terhadap Pemohon pada 16.12.2021 yang bertentangan dengan peruntukan nyata dan tersirat Perlembagaan Persekutuan serta menyalahi Akta Imigresen 1959/63 (Akta 155) dan Peraturan-Peraturan Imigresen 1963;

(ii) Satu deklarasi bahawa tindakan dan keputusan Ketua Pengarah Imigresen Malaysia yang telah mengeluarkan satu Notis Pembatalan Pas terhadap Pemohon adalah '*mala fide*' kerana Pemohon tidak melanggar (contravene) atau melakukan sebarang kesalahan (committed an offence) di bawah Akta 155 pada setiap waktu material Pas beliau dibatalkan;

(iii) Satu deklarasi bahawa tindakan dan keputusan Ketua Pengarah Imigresen Malaysia yang telah mengeluarkan satu Notis Pembatalan Pas terhadap Pemohon sebelum Pemohon dituduh di Mahkamah kerana pembatalan dibuat pramatang (premature) dan '*ultra vires*' dengan Akta 155;

(iv) Satu deklarasi bahawa tindakan dan keputusan Ketua Pengarah Imigresen Malaysia yang telah mengeluarkan satu Notis Pembatalan Pas terhadap Pemohon yang masih belum didapati bersalah untuk apa-apa kesalahan seperti dipertuduhkan di mana pembatalan yang dibuat 'premature' dan '*ultra vires*' dan ianya adalah bertentangan dan bercanggah dengan Perlembagaan Persekutuan dan Akta 155;

(v) Satu deklarasi bahawa tindakan dan keputusan Ketua Pengarah Imigresen Malaysia yang telah mengeluarkan satu Notis Pembatalan Pas terhadap Pemohon tanpa sebarang alasan yang munasabah bertentangan dengan Akta 155;

(vi) Satu deklarasi bahawa tindakan dan keputusan Ketua Pengarah Imigresen Malaysia yang telah mengeluarkan satu Notis Pembatalan Pas terhadap Pemohon adalah satu pelaksanaan kuasa secara tidak munasabah (unreasonable exercise of power);

(vii) Satu deklarasi bahawa tindakan dan keputusan Ketua Pengarah Imigresen Malaysia yang telah mengeluarkan satu Notis Pembatalan Pas terhadap Pemohon yang merupakan satu kesumbangan

prosedur (procedural impropriety) kerana tidak mematuhi peruntukan di bawah Seksyen 9(8) Akta 155 yang membenarkan rayuan dibuat terhadap pembatalan tersebut;

(viii) Satu perintah *Mandamus* terhadap responden Ketiga dan responden Kedua supaya mengarahkan dan menyelia responden Pertama untuk tidak mencabuli hak kebebasan asasi Pemohon dan mematuhi peruntukan Perlembagaan Persekutuan;

(ix) Satu perintah *Mandamus* terhadap responden Ketiga supaya mengarahkan dan menyelia responden Kedua dan responden Pertama untuk menyelaraskan langkah pelaksanaan undang-undang Persekutuan secara rasional;

(x) Satu deklarasi bahawa Notis Pembatalan Pas terhadap Pemohon adalah '*ultra vires*' Perlembagaan Persekutuan dan Akta 155;

(xi) Satu deklarasi bahawa Notis Pembatalan Pas oleh responden Pertama adalah satu penyalahgunaan kuasa (abuse of discretionary power) kerana dibuat sebelum Pemohon dituduh di Mahkamah dan diserahkan kepada Pemohon tanpa penterjemah Bahasa Bangladesh semasa Pemohon berada di dalam Depot Tahanan Imigresen;

(xii) Satu deklarasi bahawa Pemohon mempunyai jangkaan sah (legitimate expectation) bahawa langkah pelaksanaan undang-undang ke atas Pemohon hanya boleh dibuat menurut lunas undang-undang dan amalan sah yang terpakai;

(xiii) Bahawa segala arahan dan perintah yang perlu dan berikutan diberi;

(xiv) Bahawa kos-kos dalam permohonan ditanggung responden-responden;

(xv) Pampasan ditaksirkan di atas aib, trauma, ketakutan, kehilangan, kerugian, kesusahan, kerosakan reputasi dan nama baik yang dialami dan ditanggung oleh Pemohon akibat tindakan pembatalan pas tersebut; dan

(xvi) Relief-relief selanjutnya atau yang lain sebagaimana yang difikirkan sesuai dan berpatutan oleh Mahkamah yang Mulia ini.

[3] After the hearing, I dismissed the applicant's judicial review application (encl. 14). I will now set out the grounds for my decision.

Background Facts

[4] The background facts of this case are mostly undisputed and have been incorporated with or without adjustments from the statement, affidavit in support and the written submissions of the parties.

[5] The applicant is the husband holding a 'dependant' pass to a social visit pass issued to his wife, one Nilima Islam, as the 'principal' pass holder under the MM2H programme.

[6] The approval of the said principal pass to his wife and the dependant pass to the applicant was given *vide* letter dated 27 November 2008 and 24 December 2008 issued by the Immigration Department. A

[7] The fact of the applicant being a holder of a dependant pass is clearly borne out in the title of the letter in exh. JIM-2, encapsulated as 'Application For Defendant Of Social Visit Pass Holder' under "Malaysia My Second Home Programme" (MMSHP). B

[8] Clause (d) of the said approval set out as one of the terms of the approval that 'the duration of the dependant's social visit pass is subjected to the validity of the principal's approval'. C

[9] Nilima Islam's principal pass and the applicant's dependant pass were subsequently renewed and extended for a further period of ten years *vide* approval given by the Immigration Department in its letter dated 25 July 2018 (exh. JIM-3).

[10] Clause 2.6 of the said letter provides an additional term that "in the event that the Ministry of Tourism & Culture Malaysia/Immigration Department of Malaysia/Royal Police of Malaysia found that you have committed a crime in Malaysia or elsewhere, your stay under this programme will be immediately terminated". D

[11] On 8 January 2021, the principal pass of Nilima Islam was cancelled by the first respondent in exercise of the power given to him as the Director General of Immigration under s. 9(1)(b) of the Act 155. E

[**12]** A notice of cancellation of pass was issued by the first respondent on 8 January 2021 (exh. JIM-4). Section 9(1)(b) of the Act 155 states that the first respondent 'may in his absolute discretion cancel any pass at any time by writing under his hand'. Nilima Islam was blacklisted on 10 January 2021 and was subsequently deported to Bangladesh on 5 March 2021. F

[13] The cancellation of Nilima Islam's principal pass and the deportation to her country of origin were followed by her earlier arrest by the Special Branch of PDRM. Her arrest by the PDRM was based on intelligence of her involvement in a syndicate providing illegal temporary working pass to foreigners to come to Malaysia. The activities of the syndicate had endangered national security. G

[14] With the cancellation of Nilima Islam's principal pass and her deportation to Bangladesh, the Special Branch of PDRM recommended to the first respondent to cancel the dependant's pass of the applicant and to deport him back to Bangladesh, on the ground that PDRM's intelligence revealed that the applicant was likewise involved in the same illegal activities as his wife which had endangered national security. H I

[15] On 16 December 2021, the applicant's dependant pass was cancelled under s. 9(1)(b) of the Act 155. A notice of cancellation of Pass dated 16 December 2021 was issued by the first respondent (exh. JIM-5).

[16] Following the cancellation of his dependant pass, the applicant was arrested by immigration officers on 26 January 2022. Two hundred and seventy foreign passports were found with the applicant when he was arrested.

[17] On 16 February 2022 the applicant was charged in the Semenyih Sessions Court under s. 55E of the Act 155 and s. 12(1)(f) of the Passports Act 1966 (Act 150) for the said 270 foreign passports found on him.

[18] The applicant was properly represented by counsel. On 11 April 2022 the applicant was released on bail while awaiting trial for the said criminal charges at the Sessions Court.

[19] The notice of cancellation of pass in exh. JIM-5 was served on the applicant on 3 February 2022, the receipt of which was duly acknowledged by the applicant.

The Law

[20] Judicial review is generally concerned with the decision-making process where the impugned decision is flawed on the ground of procedural impropriety.

[21] However, the law has now developed to allow a decision to be challenged on the grounds of illegality and irrationality, which then permits the courts to scrutinise the decision not only for the process, but also for substance.

[22] However, the Federal Court in subsequent decisions held that not every case is amenable to such approach and merits can only be scrutinised in the most appropriate of cases. This can be seen as follows:

(i) *Petroliam Nasional Bhd v. Nik Ramli Nik Hassan* [2003] 4 CLJ 625; [2004] 2 MLJ 288; [2003] 2 MLRA 114.

> [12] Quite clearly, the views expressed by the majority in *Rama Chandran* are not the product of what some legal commentators described as 'judicial excessivism'. *On the contrary, they reflect the kind of controlled judicial activism that is needed in order to meet, in a supervisory context, the ever-widening powers conferred upon statutory tribunals or other bodies which have proliferated, in modern times and affecting, quite conceivably, all facets of society. I say 'controlled' because I take the view that Rama Chandran powers should only be invoked in appropriate cases. Otherwise, there is the danger of inculcating what a learned writer has aptly described as a 'runaway development of judicial review*'. (See Dr Venkatiyer: *The Importance of Judicial Review*, Insaf, Vol xxxi No 4, p 60. In drawing attention to the Indian experience, he says this:

India stands out as a prime example of this unfortunate development. There, the courts, have assumed competence over an amazing array of public activity: they have given directions as to the width of a road giving access to a building. (*Upendra Baxi v. State of Uttar Pradesh* [1986] 4 SCC 106); *asked a State to pass legislation to prevent ragging of college students*, (*State of Himachal Pradesh v. A Parent of a student of Medical College, Simla* [1985] 3 SCC); *revoked the limit that had been put on the expenditure on drugs in a mental hospital*, (*Rakesh Chand Narain v. State of Bihar* [1986] Supp 576); *laid down guidelines for inter-country adoption of children*, (*Laxmi Kant Panday v. Union of India AIR* [1987] SC 232); *prescribed the qualifications for drivers of buses belonging to or hired by educational institutions*, (*MC Mehta v. Union of India* [1998] IX AD (SC) 37); *sad so on*.

[13] According to him, the Indian practice has been the subject of criticism because the courts would have encroached upon the sphere allotted to the legislature by making populist declarations of rights – rights which Parliament, in its wisdom, chose not to legislate upon.

[14] *Clearly therefore, not every case is amenable to the Rama Chandran approach. It depends on the factual matrix and/or the legal modalities of the case. This is certainly a matter of judicial discretion on the part of the reviewing judge*. In the instant case, notwithstanding the very able submission by Dato' Dr Cyrus Das, I remain unconvinced that a case has been made out for revisiting *Rama Chandran* in terms of his propositions. That being the case, the answer to the question postulated for our consideration has to be in the affirmative. (emphasis added)

(ii) *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; [2010] 6 MLJ 1; [2010] 5 MLRA 696; [2011] 3 AMR 38

[16] The *Rama Chandran* decision has been regarded or interpreted as giving the reviewing court a license to review without restrain decisions for substance even when the said decision is based on finding of facts. However, post *Rama Chandran* cases have applied some brakes to the court's liberal approach in *Rama Chandran*. The Federal Court in the case of *Kumpulan Perangsang Selangor Bhd v. Zaid Noh* [1997] 1 MLJ 789; [1997] 2 CLJ 11 after affirming the *Rama Chandran* decision held that *there may be cases in which for reason of public policy, national interest, public safety or national security the principle in Rama Chandran may be wholly inappropriate*.

[17] The Federal Court, in *Petroliam National Bhd v. Nik Ramli Nik Hassan* [2003] 4 CLJ 625; [2004] 2 MLJ 288, again held that *the reviewing court may scrutinise a decision on its merits but only in the most appropriate of cases and not every case is amenable to the Rama Chandran approach*. Further, it was held that a reviewing judge ought not to disturb findings of the Industrial Court unless they were grounded on illegality or plan irrationality, even where the reviewing judge might not have come to the same conclusion. (emphasis added)

(iii) *Alam Venture Sdn Bhd & Anor v. Abdul Aziz Abdul Majid & Ors* [2015] 5 CLJ 1; [2015] 4 MLRA 371;

> It is now settled law that the courts may review the decision of an inferior tribunal on the grounds of illegality, irrationality and possibly proportionality: *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145, thus permitting the courts to scrutinise the decision not only for process but also for substance. In *Petroliam Nasional Bhd v. Nik Ramli Nik Hassan* [2003] 4 CLJ 625; [2004] 2 MLJ 288 *this court however clarified that not every case was amenable to judicial review pursuant to the principle in R Rama Chandran's case. It should only be invoked in appropriate cases. There may be cases in which for reasons of public policy, national interest, public safety or national security it may be wholly inappropriate for the courts to attempt any substitution of views*: *Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh* [1997] 2 CLJ 11; [1997] 1 MLJ 789.
>
> (emphasis added)

[23] It is settled law that the High Court will not interfere with a decision of the respondents unless it can be established that the decision is infected with errors of law.

[24] The meaning of error of law has also been explained by the Court of Appeal in the case of *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748; [1995] 1 MLRA 268; [1995] 2 AMR 1601; [1995] 2 MLJ 317 in the following words:

> *It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law*, for the categories of such an error are not closed. *But it may be said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations* (what may be conveniently termed an Anisminic error) or *if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law*. (emphasis added)

[25] Similarly, in the case of *Airspace Management Services Sdn Bhd v. Col (B) Harbans Singh Chingar Singh* [2000] 4 CLJ 77; [2000] 1 MLRA 664, the Court of Appeal held that an erroneous inference of facts is also an error of law which would warrant an order of *certiorari*:

> On the other hand, we accept, of course, that it is entirely competent for the High Court in *certiorari* proceedings to disagree with the Industrial Court on the conclusions or inferences drawn by the latter from the proved or admitted evidence on the ground that no reasonable tribunal similarly circumstanced would have arrived at such a conclusion or drawn such an inference. **An erroneous inference from proved or admitted facts is an error of law; not an error of fact**. (emphasis added)

[26] Based on the foregoing passages, it is my view that to succeed in an application for judicial review, the applicant must show that the respondents had, among others:

(i) asked itself the wrong questions;

(ii) considered irrelevant matters;

(iii) failed to consider relevant matters;

(iv) failed to apply the proper principle(s) of law; and/or

(v) reached a decision that was so perverse that no reasonable tribunal under similar circumstances would have reached it.

The Decision Of The Court

[27] The applicant submits that the action and decision of the first respondent in cancelling the applicant's MM2H pass on 16 December 2021 was done without reasonable excuse and is *ultra vires* due to the lack of adherence to procedural requirements prescribed by the law.

[28] According to the applicant, the arbitrary, unreasonable and *mala fide* cancellation of the applicant's pass had also resulted in substantial losses for the applicant and his wife who have invested a great deal under the MM2H programme.

[29] Furthermore, the notice of cancellation of pass was not duly served on time to the applicant; it was served only 49 days on 3 February 2022 after the said notice was issued on 16 December 2021. Therefore, the applicant was deprived of the opportunity to exercise his right to appeal to the Minister under s. 9(8) of the Act 155.

[30] It is to be noted that the applicant, who holds a 'dependant' pass, is the husband of Nilima Islam, where she is the 'principal' pass holder under the MM2H programme.

[31] The approval of the said principal pass to his wife and the dependant pass to the applicant was given *vide* letter dated 27 November 2008 and 24 December 2008 by the Immigration Department.

[32] Nevertheless, the principal pass held by the applicant's wife was cancelled by the first respondent under s. 9(1)(b) of the Act 155 on 8 January 2021, leading her to deportation to Bangladesh on 5 March 2021.

[33] Based on the above, it is clear that the applicant's dependant pass was cancelled by operation of law under s. 9(6)(b) of the Act 155 read together with s. 9(4)(a) of Act 155 following the cancellation of his wife's principal pass under s. 9(1)(b) of the Act 155.

[34] Sections 9(4) and 9(6)(b) of the Act 155 read as follows:

> **Director General's power to prohibit entry, or cancel any Pass or Permit**
>
> 9.(4) Where *a Pass is cancelled* under paragraph (1)(b) or a Permit is cancelled under paragraph (1)(c):
>
> (a) If its holder is present in Malaysia, *he shall not remain in Malaysia after such cancellation and shall be removed from Malaysia* in accordance with the provisions of this Act, *and he shall, thereafter, be prohibited from entering Malaysia*; and
>
> (b) [...]
>
> (6) Where a Pass is cancelled under paragraph (1)(b) or a Permit is cancelled under paragraph (1)(c); *subsections (4) and (5) shall apply to*:
>
> (a) [...]
>
> (b) *any wife of the holder of the Pass or the Permit where the wife is a holder of a Pass or Permit issued to her in consequence of the issue of the Pass or the Permit to her husband*; and
>
> (c) [...]
>
> In the same manner that they apply to the holder of the Pass or the Permit *and the notification to such holder under subsection (3) shall also constitute notification to the persons mentioned in paragraphs (a), (b) and (c).*
>
> (emphasis added)

[35] Based on the above provisions, this court is of the view that when the principal pass of the applicant's wife was cancelled on 8 January 2021 under s. 9(1)(b) of the Act 155, s. 9(6)(b) of the same Act was automatically triggered wherein the applicant's dependant pass was invalidated under s. 9(4) of the Act 155 and consequently, the applicant as the dependant pass holder is required to leave Malaysia and is prohibited from re-entering thereafter as stipulated in s. 9(4)(a) of the Act 155.

[36] Further, by virtue of s. 9(6)(b) of the Act 155, once the applicant's wife's principal pass was cancelled under s. 9(1)(b) of Act 155 on 8 January 2021, and the applicant's wife was notified of the cancellation of her principal pass on 8 January 2021 (see: exh. JIM-4), such notification to the applicant's wife on 8 January 2021 shall be considered as notification to the applicant regarding to the automatic cancellation of his dependant pass.

[37] This court is of the view that since s. 9(6)(b) of the Act 155 read together with s. 9(4)(a) of the same Act dictate the cancellation of the applicant's dependant pass is mandated by legal provisions, therefore, it is evident that the cancellation of the applicant's dependant pass was carried out in accordance with the law, leaving no room for doubt.

[38] I am of the opinion that the usage of the word "shall" in ss. 9(6)(b) and 9(4)(a) of the Act 155 unambiguously indicates that the cancellation of the applicant's dependant pass and his deportation are mandatory and compelled by the legal framework.

[39] Further, this court finds that since the applicant was deemed to have actual knowledge of the automatic cancellation of his dependant pass on 8 January 2021, the cause of action to file the present judicial review (JR) would have accrued on 8 January 2021.

[40] In the current case, the applicant, filed the present JR on 25 May 2022 which considerably exceeded the stipulated 90-days' time frame even after deducting the period for which the applicant was under remand and custody where he was unable to seek any legal advice.

[41] According to the applicant's narration, he was initially arrested on 3 December 2020 and was remanded until 18 January 2021. Subsequently, the applicant attested that he faced a second arrest on 26 January 2022 while still on bail.

[42] The applicant had sought an extension of time which was granted by this Honourable Court to file this JR however, the period for the said extension was confined to the period starting from his second arrest and the filing of the present JR *ie*, from 26 January 2022 until 22 May 2022.

[43] Moreover, there was no JR filed to challenge the automatic cancellation of the applicant's dependant pass between 18 January 2021 and 26 January 2022 when the applicant was out on bail. The applicant is without a doubt guilty of indolence for he had procrastinated to the entire period spanning across 12 months.

[44] It is my view that since the applicant's dependant pass had been cancelled by operation of law on 8 January 2021 and the applicant was deemed to have actual notice of that operation of law on 8 January 2021, the issuance of the notice of cancellation of pass on 16 December 2021 (exh. JIM-5) and the personal notification of the same to the applicant on 3 February 2022 would not revive into the dependant pass which has been cancelled by operation of law.

[45] Moreover, the action taken by the first respondent in issuing exh. JIM-5 on 16 December 2021 merely reinforced an independent and supplementary basis for the cancellation of the applicant's dependant pass through operation of law.

[46] Having reading s. 9(6)(b) of the Act 155 together with s. 9(4)(a) of the same Act and considering cl. (d) in the approval letter dated 24 December 2008 (exh. JIM-2), it is clear that automatic cancellation of the dependant pass was explicitly stipulated as a condition for issuing the said pass.

[47] Therefore, I find that the applicant's assertions that the first respondent's action were bad in faith, an unreasonable exercise of power, and an abuse of power cannot be substantiated.

[48] Further, cl. 2.6 of the approval for renewal/extension of pass dated 25 July 2018 (exh. JIM-3) provides an additional term that in the event the applicant being found committed an offence, the applicant's dependant pass will be immediately terminated.

[49] Upon reading of cl. 2.6 of the approval for renewal/extension of pass dated 25 July 2018 (exh. JIM-3), I find that it does not support the contention that the applicant must be convicted in court for a criminal offence before his dependant pass can be cancelled.

[50] I find that cl. 2.6 states in no uncertain terms that "in the event that the Ministry of Tourism & Culture Malaysia/Immigration Department of Malaysia/Royal Police of Malaysia found that you have committed a crime in Malaysia or elsewhere, your stay under this programme will be immediately terminated".

[51] The meaning of the condition is thus clear: so long as the relevant enforcement agency *ie*, PDRM or Immigration Department 'found' that the applicant 'had committed a crime in Malaysia', his dependant pass will be 'immediately terminated'. It is apparent that cl. 2.6 does not say that the applicant's dependant pass can only be cancelled upon a criminal conviction by the court.

[52] Therefore, based on the above, I am of the view that the cancellation of the applicant's dependant pass does not necessitate or depend solely on a prior conviction of criminal charges in a court of law.

[53] Further, matters concerning immigration particularly the expulsion of foreign national to their country of origin falls within the exclusive domain of the Executive competence.

[54] It is for this reason that an alien's presence in a foreign country is a privilege and not an inherent right, subject, as always, to the continuity of a friendly relationship between the host and the visiting countries.

[55] It is not uncommon to find that due to a change in individual circumstances, an alien or a class of aliens who may not have committed any criminal offence in the strict legal sense in a visiting country may nonetheless find themselves a *'persona non grata*' whose continued presence are no longer welcomed.

[56] I am of the view that to suggest otherwise that removal of an alien from a visiting country must premised on actual criminal conviction by the court as contended by the applicant, is not only unsupported by conventional practice but is also an unjustified restraint on the exercise of sovereign privilege by the Executive.

[57] In the local context, that conventional practice is translated in s. 9 of the Act 155 read together with s. 33 of the same Act. Section 33(1) reads as follows:

> **Removal of persons unlawfully remaining in Malaysia**
>
> 33. (1) **Where the presence of any person in Malaysia is unlawful by reason of section 9**, 15 or 60 the person shall, **whether or not any proceedings are taken against him in respect of any offence against this Act**, be removed from Malaysia by order of the Director General.
>
> (emphasis added)

[58] Section 33 above establishes that cancellation of the applicant's dependant pass under s. 9 alone is sufficient to render his presence in Malaysia unlawful, without the need for prior conviction of any immigration offence in court.

[59] More importantly, the facts in the present case show that there were such findings on involvement in criminal activities made by the PDRM and the first respondent: intelligence from the Special Branch of PDRM revealed that the applicant was involved in the same illegal immigration activities as his wife which had endangered national security (para. 8 encl. 20).

[60] Section 59A(1) of the Act 155 allows partial judicial review which is confined to procedural compliance by the first or second respondent. Beyond the extent of procedural compliance, 'there shall be no judicial review in any court of any act done or any decision made by the Minister or the Director General'.

[61] Further, s. 59A(2) of the Act 155 specifically prohibits reliefs in the form of prerogative orders of *mandamus*, prohibition and *certiorari*, and application for a declaration or an injunction. The decision, direction and act pertaining to the cancellation of pass is expressly mentioned in s. 59B(b) of the Act 155 as an 'order' by which the exclusion of JR seeks to cover under s. 59A of the Act 155.

[62] The decision to cancel a pass by the first or second respondent is meant to be immune from judicial scrutiny, except within the narrow confine of procedural compliance. In other words, the merits of the consideration underlying a decision to cancel a pass is a matter reserved to the good judgment of the Immigration authority and/or Minister.

[See: *Haris Fathillah Mohamed Ibrahim & Ors v. Tan Sri Dato' Sri Hj Azam Baki & Ors* [2023] 3 CLJ 653; [2023] 2 MLJ 296; [2023] 3 MLRA 266; *Regina (Privacy International) v. Investigatory Powers Tribunal* [2020] AC 491; [2019] UKSC 22].

[63] This court is of the view that the fact in the present case which entails consideration of national security *ie*, intelligence gathering by the Special Branch of PDRM pertaining to illegal activities of immigration syndicates provides a proportionate justification on the limit of judicial intervention as found in s. 59A of the Act 155.

[64] This court holds the firm view that the Executive decision pertaining to the national security and immigration is not within the purview of this court to be assessed on the substantive merits of the application. Such an assessment would essentially equate to scrutinising the judiciousness of policy determinations made by the cabinet.

[65] The then Supreme Court in the case of *Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh* [1997] 2 CLJ 11; [1996] 2 MLRA 398; [1997] 1 AMR 1008; [1997] 1 MLJ 789 at 799 held as follows:

> Of course, there may be cases in which – *for reasons of public policy, national interest, public safety or national security – it may be wholly inappropriate for the courts to attempt any substitution of views*. Unlike the executive, *the judiciary is not armed with all the information relevant to such matters and one could well understand a High Court, in the exercise of its discretionary power, declining to enter into the merits of a decision involving these considerations*. Each case must be considered on its own facts and it would be quite unwise to attempt the formulation of an all-embracing rule. (emphasis added)

[66] Reverting to the facts in the present case, s. 9(6)(b) of the Act 155 read together with s. 9(4)(a) of the same Act dictate the mandatory cancellation of the applicant's dependant pass by operation of law, and without the need of any intervention or action on the part of the first respondent, it follows that there can be no question of the cancellation of the applicant's dependant pass not being done in accordance with law.

[67] The applicant also complained that he was deprived of the right to appeal to the Minister under s. 9(8) of the Act 155. However, upon perusal of the cause papers, I find that he was not deprived of the right to appeal to the Minister under the said section. This is despite the fact of his inability to comply with the statutory time limit of seven days for filing of appeal (as he was under remand at the material times). For in any event, his lawyer had lodged an appeal on his behalf to the Minister *vide* letter dated 15 April 2022 (para. 36 encl. 2).

[68] This is again despite the fact that the said appeal to the Minister was not received by the first respondent as required of and informed to the applicant *vide* the notice of cancellation of pass in exh. JIM-5 (para. 16 encl. 20). The applicant had deposed that the Minister has yet to make any decision on his appeal to this date (para. 37 encl. 2).

[69] Further, it is my view that lodging an appeal to the Minister under s. 9(8) of the Act 155 does not operate as a stay against the cancellation of the applicant's dependant pass by the first respondent and does not have the effect to stop the immediate deportation or removal of the applicant from Malaysia.

[70] I find support for my view by referring to the proviso of s. 9(8) of the Act 155 which states as follows:

> ...
>
> Provided that **notwithstanding any appeal under this subsection, pending the determination of such appeal**, the order of the Director General under paragraph (1)(a), or **the cancellation of the Pass or Permit under paragraph (1)(b)** or (c) respectively, or the **application of subsections (4) and (5) to any person under subsection (6), shall have full force and effect** as provided under subsection (2) or (3), as the case may be, and where accordingly the **person appealing** is outside Malaysia, or has left Malaysia or been removed from **Malaysia before its determination**, he may be permitted to enter or re-enter Malaysia if his appeal is allowed and the order under paragraph (1)(a) is revoked, or the Pass or Permit is restored to him, as the case may be. (emphasis added)

[71] The above proviso to sub-s. 9(8) of the Act 155 clearly states unequivocally that notwithstanding any appeal to the Minister, the cancellation of the pass and the removal/deportation by the first respondent 'shall have full force and effect' from the date of the cancellation.

[72] Having read to s. 9(8) of the Act 155, I view that the said section does not impose any procedural obligation on the part of the respondents. The failure on the part of the Minister to decide or respond to the appeal, if any, does not without more amount to a procedural non-compliance actionable by way of a JR.

[73] Even if it does, this court views that s. 59A of the Act 155 prohibits a merits review, the question of whether the applicant's appeal should be allowed or otherwise is not a matter amenable to JR. Hence, the reliance by the applicant on his pending appeal to the Minister under s. 9(8) of the Act 155 would not in any event assist his present JR.

Conclusion

[74] Premised on the aforesaid reasons, I am of the view that the decision of the respondents is not tainted with any errors of law, irrationality and/or unreasonableness that warrant the intervention of this court.

[75] As such, the applicant's application for JR (encl. 14) is dismissed with costs of RM2,500 without the allocatur fee.